No. 83-499

Office-Supreme Court, U.S.
FILED
SEP 2 1983
ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BERNARD J. MARCUS,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether the exercise of the federal courts' supervisory powers to dismiss an indictment is mandated when the government first fails to provide grand jurors with available transcripts of testimony emanating from days on which they were absent and then permits those jurors to vote on true bills of indictment on counts for which they heard no evidence.

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OPINIONS BELOW

The judgment order of the United States Court of Appeals for the Third Circuit, affirming the judgment of the United States District Court, is reproduced in the Appendix at 1a.

The order of the District Court for the Eastern District of Pennsylvania, which was affirmed on appeal is unreported. This order is reproduced in the Appendix at 3a.

JURISDICTION

The judgment of the United States Court of Appeal for the Third Circuit, reproduced in the Appendix at 1a, was entered on July 26, 1983. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution:

Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury....

STATEMENT OF THE CASE

A. Introduction

The United States Court of Appeals for the Third Circuit affirmed Petitioner's conviction. In so doing it unconstitutionally curtailed the procedural due

process rights that must be afforded to an individual who is indicted. Never before has a circuit court litigated a case in which the defendant produced documentary evidence that absent grand jurors who had heard no evidence on various counts of the indictment were nonetheless permitted to and in fact did vote to indict on those disputed counts. Yet in this criminal case, with no basis in prior law, the Third Circuit restricted the scope of an individual's procedural rights by effectively holding that as long as twelve informed grand jurors vote to indict, the number of uninformed grand jurors who are also permitted to vote to indict is irrelevant.

We submit that the Third Circuit's unduly restrictive interpretation of the Fifth Amendment is erroneous and in conflict with prior judicial constructions of the Amendment. The circuit court's order is also in conflict with its own recent caveats that absent grand jurors must be provided transcripts so that they can be informed of the evidence that they missed.

This certiorari petition presents an issue that this Court has not yet definitively ruled on: whether an individual's Fifth Amendment procedural due process

rights are violated when, although twelve informed grand jurors vote to indict, several uninformed grand jurors also vote to indict. The fact that uninformed grand jurors vote on an indictment is significantly more egregious in this case because the government admitted that it had the transcripts of testimony available to provide to absent grand jurors. Access to the available transcripts would have insured that all grand jurors would have been informed of all the evidence prior to the vote. The government prosecutors, however, consciously decided not to provide these transcripts to the absent grand jurors.

The matter presented by this petition is a case of first impression. As noted, in this case the government not only allowed uninformed grand jurors to vote on the indictment, but the prosecutors also intentionally decided not to make these grand jurors informed by providing them with available transcripts of testimony that they did not hear.

Petitioner Bernard J. Marcus respectfully asserts that there are three reasons to grant a writ to review the decision of the Court of Appeals for the Third Circuit.

FIRST, Petitioner suffered actual prejudice because absent grand jurors voted to indict him on counts on which they heard no evidence. The circuit court's affirmance of Petitioner's conviction therefore violated his right to due process of law in that it upheld the validity of his irreparably tainted indictment.

SECOND, the longstanding failure of the United States Attorney's Office in the Eastern District of Pennsylvania to provide available transcripts to absent grand jurors is contrary to Justice Department guidelines and judicial admonition. It apparently reflects a pervasive pattern of conduct condoned and thus encouraged by the United States Department of Justice.

THIRD, the government's failure to provide absent grand jurors with available transcripts of missed testimony mandates the exercise of this Court's supervisory powers to dismiss the Petitioner's indictment. Indeed, the exercise of this Court's supervisory powers will void a miscarriage of justice because existing procedures for the enforcement of guidelines concerning the availability of witness transcripts have proven inadequate.

Each of these considerations is sufficient for the granting of a writ to review the decisions of the court below.

B. Statement Of Essential Facts

This Petition is submitted on behalf of Bernard J. Marcus. Mr. Marcus is a former business agent for Local 169 of the International Teamsters Union. On June 29, 1982, nineteen members of a grand jury voted unanimously to indict him on a single count of Racketeering, 18 U.S.C. §1962(c), five counts of Income Tax Evasion, 26 U.S.C. §7201, and fourteen counts each of Extortion, 18 U.S.C. §1951 and Receipt of Payments by a Union Official, 29 U.S.C. §186(a)(2), (b)(1) and (d). These charges emanate from the receip of payments from employers of his union members.

On November 1, 1982, Mr. Marcus entered a non-negotiated guilty plea pursuant to the holdings of the Third Circuit in United States v. Zudick, 523 F.2d 848 (3d Cir. 1975) and United States v. Moskow, 588 F.2d 882 (3d Cir. 1978). His appeal is based on facts conceded by the government. Grand jurors who were absent for the meetings of the grand jury during which

the government presented all of its evidence concerning particular counts of the indictment, and who were denied an opportunity to review transcripts of those sessions, were nevertheless permitted to vote true bills on those counts. The transcribed testimony of those sessions was available to the government. Rather than making the transcripts accessible to the jurors, the Assistant United States Attorney and a government agent engaged in a brief dialogue concerning the indictment. The Assistant United States Attorney has labeled this dialogue a "summary" of evidence.

Petitioner argues that the government's failure to provide absent grand jurors with transcripts was an abuse of proper jury procedures that violated his right to due process. Petitioner concedes that there was sufficient evidence to support his indictment. Nonetheless, he asks this Court to exercise its supervisory powers to dismiss the indictment and establish a prophylactic rule that will end an entrenched and flagrant abuse of prosecutorial powers that has resulted in indictments voted upon by uninformed grand jurors. Petitioner assures this Court that the

timing and quality of evidence adduced against him will not permit him to escape punishment regardless of this Court's decision.

C. Counts In The Defendant's Indictment Were Voted Upon By Grand Jurors Who Had Heard No Supporting Evidence

Of the nineteen jurors who voted to indict the Petitioner, only seven attended each of the thirteen sessions at which the government presented evidence.[1] A comparison of the grand jury's attendance records and schedule of the government's presentation of witnesses reveals that evidence for many of the counts was offered on a single meeting day of the grand jury. Therefore, the number of grand jurors who heard evidence on a particular count can be determined.

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1. Counsel for the government and Mr. Marcus have stipulated to court records concerning grand jury attendance. The grand jury attendance records are reproduced in the Appendix at 5a-6a. Of the nineteen voting jurors, more than twelve attended each session of the grand jury. Review of the Stipulation shows that of the voting jurors:

   a) seven jurors attended each of the sessions;
   b) six missed one of the sessions;
   c) one missed four of the sessions;
   d) one missed five of the sessions.

This fact was recognized and conceded by the government in its Brief in the circuit court. According to the government:

> "....the stipulation as to the date that...witnesses testified...can be compared with the indictment to determine when evidence as to each count was presented. By comparing the dates the witnesses testified; the list, identified by number of grand jurors who heard that witnesses [sic]; and, the grand jurors who voted for a true bill, one can determine the number of the 19 grand jurors voting for the indictment who heard the testimony of any particular witness."

The government offered the following chart, which it stipulated was an accurate review of 1) testimony presented; 2) the date on which it was presented; and 3) the number of grand jurors who heard the testimony.

Jurors voting for Indictment who heard Testimony	Relevant Extortion and Taft-Hartly Counts	Witness as to Payments	Date of Grand Jury Appearance
17	Counts Two and Three	Eugene Chaiken	April 13
19	Counts Four and Five	David Blanck	March 9
15	Counts Six and Seven	Leonard Buten	March 30
15	Counts Eight and Nine	Robert Dee	March 30
18	Counts Ten and Eleven	Richard Leff	April 27
17	Counts Twelve and Thirteen	Norman Davidson	June 15

Jurors voting for Indictment who heard Testimony	Relevant Extortion and Taft-Hartly Counts	Witness as to Payments	Date of Grand Jury Appearance
19	Counts Fourteen and Fifteen	Max Krenzel	June 29
17	Counts Sixteen and Seventeen	Bernard Paul	June 22
19	Counts Eighteen and Nineteen	Lester Rosenfeld and Benjamin Stauss	March 9
17	Counts Twenty and Twenty-One	Samuel Simon	May 4
15	Counts Twenty-Two and Twenty-Three	Edward Rosen	March 30
18	Counts Twenty-Four and Twenty-Five	Theodore Roberts	May 4
17	Counts Twenty-Six and Twenty-Seven	Harold Newman	June 22
15	Counts Twenty-Eight and Twenty-Nine	Joseph Garde	May 11
18	Counts Twenty-Eight and Twenty-Nine	Herbert Garde	May 4
18	Counts Thirty and Thirty-One	Robert Reichlin	March 16
17	Counts Thirty-Two and Thirty-Three	Robert Goldenberg	June 15
	Count One (RICO Predicate Acts)		
18		Sidney Weinberg	April 20
18		Marvin Katz	April 27
18		Leonard Pasternak	May 4

As the chart indicates, on March 30, 1982, the government presented the grand jury with testimony from Leonard Buten, Robert Dee and Edward Rosen.

Based on the government's above-cited admission and counsel's review of the transcripts of the grand jury testimony, it appears that the testimony of those witnesses on that day was the only evidence adduced by the government in support of Counts six, seven, eight, nine, twenty-two and twenty-three of the Marcus indictment. This crucial session was missed by four grand jurors. These jurors voted to indict Mr. Marcus on all counts of the indictment, including those particular counts upon which they heard no evidence.

The Assistant United States Attorney chose not to provide available transcripts of the March 30, 1982, grand jury session to the four absent jurors. Instead of transcripts, the government called the assigned F.B.I. agent as a witness for the purpose of summarizing facts alleged in the indictment.[2] This summary, which took place on June 29, 1982, was to be the sole source of information on six counts of the indictment upon which the four absent jurors were to base their vote.

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2. The summary of evidence presented by the assigned F.B.I. agent to the grand jury has been made part of the Appendix, pages 9a to 36a.

This summary, however, never took place. Rather, the agent and Assistant United States Attorney engaged in the following dialogue in which facts supporting the charges in the indictment were referred to from time to time.

Counts Six and Seven:

MR. WELSH: "Count Seven would be the Taft-Hartley component of that, charging the final $500 payment. Count Six would be M. Buten and Sons. You recall Leonard Buten, members of the Grand Jury? You never knew that, the paint company?"

THE FORELADY: "Yes."

MR. WELSH: "Count seven is a Taft-Hartley charge based upon this testimony. $500 cash payment. You will note that is the last of the company payments coming up until December of 1981.

Dee Paper, do you recall Robert Dee?"

MR. WELSH: Q. "Agent Gentile, is it correct that Robert Dee testified for at least a portion of the period he was paying Frank Keane?"

A. "Yes, he did."

MR. WELSH: Q. Do you recall his testimony, members of the Grand Jury?

GRAND JURORS: "Yes."[3] (Appendix at 17a-18a).

Counts Eight and Nine:

The following incomprehensible explanation was offered to the grand jury pertaining to Count Eight:[4]

MR. WELSH: Q. "Agent Gentile, is it correct that Robert Dee testified for at least a portion of the period he was paying Frank Keane?"

A. "Yes, he did."

MR. WELSH: Q. "Is it correct, Agent Gentile, that that $18,500 estimate takes that into account, that is, that Mr. Marcus is not charged with having received it?"

A. "Yes. There was a discrepancy in the years where he allegedly was paying Keane. And when he restarted paying Mr. Marcus, again the figure is a very conservative figure."

....

MR. WELSH: "It just means that if you assist knowingly in an illegal act, you are guilty just as if you did it yourself. This is to red flag for you and any other Jury that this Count, some of the money went directly to Mr. Keane. We would argue that the initial contact was made by Mr. Marcus and there-

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3. One can only surmise that even the absent jurors answered yes to the prosecutor's question.

4. Counts eight and nine of the indictment are the only charges concerning Mr. Marcus' dealings with Robert Dee and Dee Paper Company.

> fore he would be guilty as an aider and abettor at least." (Appendix at 18a-19a).

As to Count Nine, this explanation was offered:

> "Of course Nine is Taft-Hartley." (Appendix at 19a).

Counts Twenty-two and Twenty-three:

The evidence offered as to Counts twenty-two and twenty-three of the indictment was no more illuminating:

> "Twenty-two and Twenty-three would be Edward Rosen. Do you recall Raymond Rosen? [No Answer]. That would be way back. Once again, this charges that the money came out of Mr. Rosen's pocket. (Appendix at 22a).

In sum, no facts were presented to the absent jurors concerning the unique circumstances of counts six, seven, eight, nine, twenty-two and twenty-three. The absent grand jurors were nevertheless permitted to vote true bills of indictment based on evidence they never heard.

D. Counsel's Argument At Petitioner's Change Of Plea Hearing: A Sympathetic Judicial Response

Petitioner's counsel made the trial judge aware of the aforementioned facts prior to the Court's

acceptance of Mr. Marcus' guilty plea. Counsel made two arguments. First, counsel claimed that the vote of the absent grand jurors was a response to a "herd instinct" which precluded deliberate evaluation of the government's case.

MR. KIDD: "I wouldn't be here complaining on this issue if there were twelve or more who voted for indictment who attended all sessions."

THE COURT: "Oh no, of course, you couldn't.

MR. KIDD: "I think that would eliminate the issue. It's only the fact that twelve informed jurors—at least I believe—that twelve have to vote who are informed to return an indictment."

THE COURT: "Well it's what you said before, that what I really have in mind is, collective information...."

MR. KIDD: "I think what happens is that when they start voting they get caught up in a collective—I won't use the word "frenzy," but, thinking of some other word, collectively they start responding, 'yes, yes, yes, yes'." (emphasis added).

Second, counsel contended that the government could have easily remedied this prejudice by making available transcripts of previous testimony.

MR. KIDD: "...No. 2, it is my understanding that no transcripts were made available during the period of time, and that the only summary was given by Special

Agent Gentile, and I have a copy of that at this point...."

THE COURT: "...I think by analysis on that, you could determine whether at some time or another all twelve grand jurors or twelve grand jurors heard the evidence, but what bothers me is the question you raise.

Say grand juror No. 8 was absent on the day that the testimony concerning count four was presented. Could that juror vote for a true bill on count four;"

MR. KIDD: "My own personal opinion is that he shouldn't but I would almost guarantee you he did."[5]

The prosecution attempted to justify its failure to provide absent jurors with transcripts on grounds of convenience and common practice. The trial judge, however, was not persuaded by the government's apology for its procedure.

THE COURT: "...I find myself somewhat unimpressed by the idea that it is impractical to give them [absent jurors] a transcript."

Rather, the Court agreed with counsel's simple solution to the problem:

MR. KIDD: "...but wouldn't a simple solution be to require any absent grand juror to read the transcript of the witness who appeared before the grand jury on the days they were absent?"

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5. The court's own records of unanimous grand jury vote on all counts indicates that absent jurors did cast their lot.

THE COURT: "Oh, Mr. Kidd, I hesitate to suggest to the United States Attorney's Office any intelligent solution."

MR. KIDD: "Isn't that better than a summary? You just read the transcript, and then you become an 'informed grand juror.'"

THE COURT: "Well, if you are asking me, yes, I will say it would be."

At the close of oral argument, Petitioner's counsel and the Court set the stage for this appeal.

MR. KIDD: "...but there is no question this issue will keep coming up, and at some point some attorney will be successful because some judge will become disturbed and at some point the supervisory power of the Court will be exercised to correct the system. Isn't that where we are going with this issue, I mean, ultimately?"

THE COURT: "I think probably."

MR. KIDD: "I do, too."

THE COURT: "I think it's going to be the supervisory power of the Court of Appeals."

MR. KIDD: "I would hope it would be my case, Judge, to be very frank with you."

THE COURT: "It may be."

MR. KIDD: "It's about time I got lucky."

THE COURT: "It may be your case in the Court of Appeals." (emphasis added).

The trial court was correct in identifying the supervisory power of the federal courts as the remedy for the government's illegal conduct. Unfortunately, although it was not his "case in the Court of Appeals," Petitioner's counsel respectfully submits that this Court should make it "his case" in which to exercise its supervisory powers to put an end to the unnecessary and unconstitutional governmental practice of permitting uninformed grand jurors to vote on a true bill of indictment.

REASONS FOR GRANTING THE WRIT

> "Where the potential for abuse is so great, and the consequences of a mistaken indictment so serious, the ethical responsibilities of the prosecutor, and the obligation of the judiciary to protect against even the appearance of unfairness, are correspondingly heightened."[6]

The facts underlying the instant case present an issue of apparent first impression in the federal courts—whether due process is denied when:

1. Grand jurors vote to indict on counts on which they hear no evidence; and

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6. United States v. Serubo, 604 F.2d 807, 817 (3d Cir. 1979).

2. The government does not make available transcripts of previous sessions to "inform" absent jurors of each of the Defendant's alleged criminal acts prior to their vote to indict.

The Petitioner is aware of no other case involving grand jurors who were permitted to indict without the benefit of evidence and where the remedy of transcripts was available but nevertheless ignored by the government.[7] While the Petitioner claims actual prejudice as a result of the government's failure to properly "inform" grand jurors before their vote to indict, he also argues that even in the absence of such harm, this Court must exercise its supervisory powers to end the habitual abuse of grand jury procedure.

I. THE CIRCUIT COURT'S AFFIRMANCE OF PETITIONER'S CONVICTION VIOLATES DUE PROCESS BECAUSE PETITIONER SUFFERED ACTUAL PREJUDICE IN THAT ABSENT GRAND JURORS VOTED TO INDICT HIM ON COUNTS ON WHICH THEY HEARD NO EVIDENCE

Nineteen grand jurors voted unanimously to

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7. The Petitioner concedes that the issue of the possibility of grand jurors not hearing evidence on particular counts has been addressed by the federal courts. See United States v. Barker, 675 F.2d 1055 (9th Cir. 1982); United States v. Leverage Funding Systems, Inc., 637 F.2d 645 (9th Cir. 1980), cert. denied, 452 U.S. 961 (1981).

indict Bernard Marcus. Only seven of those jurors, however, attended each of the sessions at which the government presented evidence. Significantly, two jurors were permitted to deliberate and vote to indict even though they had missed one third of the jury sessions. Therefore, because the government failed to give jurors transcripts of evidence presented on days on which they were absent, jurors voted true bills of indictment on charges for which they heard no evidence. It bears repeating that the Petitioner's argument is not directed to the quality of evidence presented to the absent grand jurors but rather to the failure of presentation. This Court's attention is not focused on the use of a summary to establish probable cause but on the absence of any evidence presented to absent grand jurors. See United States v. Phillips, 664 F.2d 971 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982). The government's cavalier presentation of testimony permitted absent grand jurors to find probable cause to indict without the benefit of supporting evidence. The grand jury's vote has been indelibly tainted and

therefore Petitioner's right to due process of law has been violated. See United States v. Estepa, 471 F.2d 1132 (2d Cir. 1972).

Counsel is well aware that it is not the function of this Court, at this juncture in the proceedings, to test the quality of evidence presented to the grand jury. See United States v. Costello, 350 U.S. 359 (1956). Conversely, where laxity in the government's procedures before the grand jury diminishes the integrity of an indictment as a finding of probable cause, severe judicial scrutiny is warranted. See United States v. Estepa, supra. In this case, the absent grand jurors who voted to indict the Petitioner were presented with no evidence. This violation of Petitioner's due process rights should trigger the application of this Court's supervisory powers to quash the irreparably tainted indictment.

A. The Dialogue Between The Assistant United States Attorney And The F.B.I. Agent Failed To Inform Grand Jurors Of Evidence Presented On Days On Which They Were Absent

The agent's testimony of June 29, 1982, was not a summary that informed jurors of evidence

presented on days on which they were absent. It was a tiptoe through the indictment without regard for evidence. While it is expected that the administration of justice be blind, nowhere is it written that grand jurors are to be kept in the dark.

The most charitable review of the assigned F.B.I. agent's testimony prior to the grand jury's vote cannot baptize it as a summary. One can only assume that it was directions similar to those offered by the F.B.I. agent and prosecutor which caused the ancient Hebrews to wander in the wilderness for forty years. The Petitioner dares the government to defend the dialogue between the Assistant United States Attorney and the F.B.I. agent as a summary of evidence actually intended to inform a jury.

The record shows that the trial judge was clearl troubled by the obvious breach of due process caused by the agent's "summary of evidence." At Petitioner's guilty plea hearing, the trial judge stated:

THE COURT: "I guess really the question is: were enough grand jurors aware of all of the evidence that was presented to the grand jury to return a valid indictment?"

MR. WELSH: "It is my position that the answer is 'yes', but as a caveat, I must offer that I can't assure the Court that every grand juror who voted for an indictment had specific information as to every count." (emphasis added).

. . . .

THE COURT: "But if a trial jury, if all the members of the trial jury don't hear all the testimony, there is a mistrial."

It is against the backdrop of cases like the matter sub judice that Courts have noted on numerous occasions that "the fact that grand jury proceedings are secret, ex parte and largely under control of the federal prosecutor" requires special scrutiny. See, e.g., United States v. Serubo, 604 F.2d 807 (3d Cir. 1979); United States v. Pabian, 704 F.2d 1533, 1535 (11th Cir. 1983). The task of a grand jury is to evaluate the law and facts presented to it. It must determine whether there is probable cause to believe that the charges brought against the defendant are true. Bracy v. United States, 435 U.S. 1301, 1302 (1978); United States v. Cederquist, 641 F.2d 1347 (9th Cir. 1981). Although courts have avoided close analysis of the evidence

presented to the grand jury, they have vigorously protected the fact-finding process. As the Third Circuit noted in United States v. Provenzano, 688 F.2d 194 (3d Cir.), cert. denied, 103 S. Ct. 492 (1982):

> "It is indeed speculative to consider what bit of evidence might have persuaded a grand juror to vote for or against an indictment. But the grand juror's judgment is what the Constitution requires, and the defendant is entitled to an informed determination of probable cause." 688 F.2d at 202.

The constitutional requirement that grand jurors actually evaluate facts which they have heard was ignored in the instant case. Although there was no time problem posed by the statute of limitations or transcript availability, the government forged full speed ahead, confident that its shortcut through due process would never be discovered.

The law is clear that a federal court may exercise its supervisory powers to dismiss an indictment on grounds of denial of due process or as a remedy of longstanding prosecutorial misconduct.[8] A Third Circuit court held that actual

8. See McNabb v. United States, 318 U.S. 322, 340-42 (1956).

prejudice need not be shown by a defendant in order to trigger a federal court's exercise of its supervisory powers in the dismissal of an indictment. See United States v. Serubo, supra. But see United States v. McKenzie, 678 F.2d 629, 631 (5th Cir.), cert. denied, 103 S. Ct. 450 (1982). Nonetheless, the Petitioner can show actual injury in the instant case. The litmus test for determination of actual prejudice is a simple one. Did the prosecutor's failure to present absent grand jurors with transcripts of evidence that they missed significantly infringe upon the ability of the grand jury to exercise its independent judgment?[9]

The absent jurors could not reasonably be expected to make an independent choice. They were denied access to readily available grand jury transcripts and could not participate intelligently in deliberations. The insights and protection they might have offered the Petitioner were negated. At best, the absent jurors were simply the "govern-

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9. See United States v. Cederquist, supra; United States v. Chanen, 549 F.2d 1306, 1309 (9th Cir.), cert. denied, 434 U.S. 825 (1977).

ment's rubber stamp;" at worst, they were active participants in the defilement of the grand jury process.

B. The Circuit Court Failed To Recognize That The Petitioner Presented Sufficient Evidence To Rebut The Presumption That All Grand Jurors Are "Informed"

There is a presumption in the law that grand jurors have heard the evidence on which they vote. See, e.g., United States v. Lang, 644 F.2d 1232, 1238 (7th Cir.), cert. denied, 454 U.S. 870 (1981). Previous case law upholding indictments has confronted only the possibility of an absent juror not hearing sufficient evidence on a particular count on which he has voted. See, e.g., United States v. Garner, 663 F.2d 834, 840 (9th Cir. 1981). In United States v. Barker, supra, the court affirmed this presumption when it referred to Leverage Funding, supra, the Ninth Circuit's seminal case on the subject of "informed grand jurors":

> "Leverage Funding requires that in the absence of contrary evidence, we presume that 'grand jurors have properly performed their duties' and that a 'grand juror who votes to indict an individual on a particular count has heard sufficient

evidence.'" 675 F.2d at 1058. (emphasis added).

The question of an informed grand juror was raised in United States v. Camiel, 503 F. Supp. 769 (E.D. Pa. 1980). In Camiel, Judge Green wrote:

> "Since Fed. R. Crim. P. 6(e) now requires that all grand jury proceedings involving the presentation of evidence be recorded stenographically or by an electronic device, a juror who has been absent may keep abreast of the evidence by reviewing the transcripts or tapes of the missed sessions." 503 F. Supp. at 772.

Judge Green anticipated the issues raised by the instant case, and entertained the possibility that available transcripts of witness testimony might not be used by the prosecutor. He recognized that if a juror who voted to indict missed significant portions of the government's presentation of evidence, the court would be faced with a different case. According to Judge Green:

> "As the record now stands in the present case, I have no reason to believe that the indictment was not returned by at least twelve informed jurors. However, as I stated during the hearing on this motion, should those portions of the grand jury transcripts disclosed to the defense

> pursuant to my order of July 25, 1980 reveal that some of the grand jurors who voted to return this indictment missed sessions during which significant evidence, particularly evidence which might exculpate the defendants, was presented, I would reconsider defendant Fumo's motion to dismiss." 503 F. Supp. at 722. (emphasis added).

Judge Hannum cited Camiel and took it a step further in United States v. Deerfield Specialty Papers, Inc., 501 F. Supp. 796 (E.D. Pa. 1980). In Deerfield, the Judge permitted the defendants disclosure of grand jury ministerial records. After discussing the issue of grand jury attendance at length, Judge Hannum made a specific finding that review of transcripts or recordings of missed sessions by absent grand jurors was viewed as a "viable, acceptable and well-established alternative to requiring perfect attendance." Id. at 814. Judge Hannum wrote:

> "The practical result of this course [permitting jurors to read transcripts] is to grant grand jurors the courtesy and luxury of not being required to maintain perfect attendance in order to properly dispense with their responsibilities. In a case involving the complexity and duration of this one, such consider-

> ations are absolutely necessary. (citations omitted). So long as transcripts and recordings are available, knowledge by the grand jurors of the facts of the case will not be dissipated and the presumption of propriety of Grand Jury proceedings will remain." Id. at 814-15.

In a similar context, in United States v. Garner, 663 F.2d 834, 840 (9th Cir. 1981), the Court stated:

> "We do not require that the prosecutor present live witnesses to the grand jury; it is sufficient if the prosecutor presents complete transcripts of sworn testimony."

In the instant case, the circuit court failed to recognize that the Petitioner presented sufficient evidence to rebut the presumption that all grand jurors are "informed." District Judge Lord, however, recognized the damaged goods he was dealing with when he stated at Petitioner's guilty plea hearing:

> "I am not completely happy with my ruling in this case, and the reason goes back much further than Leverage Funding or any of those. It goes back to the fundamental purpose of the grand jury, and that is to stand as a shield between the mighty sovereign with all of its might and all of its resources, and the single little individual who is accused

> by the sovereign, and unless that grand jury is informed, unless those who returned the indictment are informed, they can't perform that great historic function.
>
> But, nonetheless, I agree with you that what I think the state of the law is. I think you are right on the state of the law now.
>
> It would not make me unhappy if the Court of Appeals reversed me."

If it is truly the purpose of a grand jury to be an informed protector of individual rights, then transcripts and detailed summaries must be made available to the jurors in every case involving multiple counts and extended investigations. Immediate access to such information just prior to the vote to indict might bring that procedure closer to Judge Lord's ideal and make it something other than the mechanical exercise it has become as a result of governmental complacency.

II. THE GOVERNMENT'S LONGSTANDING FAILURE TO PROVIDE AVAILABLE TRANSCRIPTS TO ABSENT GRAND JURORS IS CONTRARY TO JUSTICE DEPARTMENT GUIDELINES AND JUDICIAL ADMONITION AND DEMANDS THE EXERCISE OF THIS COURT'S SUPERVISORY POWER TO DISMISS THE PETITIONER'S INDICTMENT

In United States v. Serubo, supra, the Court

held that the dismissal of an indictment in the exercise of the court's supervisory powers may be an appropriate remedy to correct flagrant or persistent government abuse of the grand jury, despite the absence of prejudice to the defendant.[10] The Serubo decision reflected well established authority that where the government's "error violates court standards for conducting judicial proceedings, reversal will follow even though the effect on the particular litigants may have been inconsequential or non-existent."[11] The Petitioner contends that the instant case is one which cries out for this Court's exercise of its supervisory powers to end a longstanding and easily avoided abuse of the grand jury.

During the course of the Petitioner's guilty plea colloquy, the Assistant United States Attorney defined the scope of the problem raised by the instant case. He admitted that transcripts of witness testimony were available at the time the

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10. Serubo, supra, 604 F.2d at 817.

11. See Note, The Supervisory Power of the Federal Courts, 76 Harv. L. Rev. 1656, 1657 (1963) (cited in Serubo, supra, 604 F.2d at 817).

grand jury voted to indict the Petitioner. He also admitted that it was not the common practice in the Eastern District of Pennsylvania to make those records available to jurors who had been absent for earlier meetings of the grand jury even where all of the evidence on particular counts of the indictment was presented at the missed sessions.

MR. WELSH: "Unfortunately, Mr. Kidd's testimony does present a problem.

. . . .

I suppose it would be possible at times to present the transcripts, perhaps that would be the best of all worlds, but as the Court may know, there is a time lag.

Testimony..."

THE COURT: "There is a what?"

MR. WELSH: "There is a time lag in our ability to present transcripts."

In the Petitioner's case, however, there was not a problem of time lag. In response to an inquiry by Petitioner's counsel, the Assistant United States Attorney stated:

MR. WELSH: "Your Honor, some transcripts were available."

In response to an additional problem raised by Petitioner's counsel, the Assistant United States Attorney admitted:

MR. WELSH: "I can't tell the Court which ones were. I know some were not. However, I will agree that some, if not most, [transcripts] were available."

The prosecution paid Petitioner's counsel the ultimate compliment when he conceded that although the failure to provide transcripts was a practice that "prosecutors probably do flirt with disaster on," they were usually able to get by:

> "Where we don't have counsel like Mr. Kidd, defense lawyers often don't bring it to the court's attention."

The prosecutor's statements stand as the best evidence of how grand jury safeguards are enforced in the Eastern District of Pennsylvania. The government will "flirt with disaster" until pushed by this court or the tenacity of defense counsel.

In sum, the Petitioner argues that this Writ should be granted because case law, Justice Depart-

ment guidelines and notions of fairness should have put the government on notice that absent grand jurors must see prior testimony before they are permitted to vote a true bill of indictment.

A. Judicial Precedent Put The Government On Notice That Absent Grand Jurors Must Hear Testimony Or See Transcripts Of Testimony Before Voting On An Indictment

The Petitioner has cited ample authority that the idea of providing absent grand jurors with transcripts of witness testimony is neither a novel nor different response to the demands imposed on jurors by the rigors attendant to the investigation of complex criminal activity. The Third Circuit affirmed the practice in United States v. Wander, 601 F.2d 1251, 1260 (3d Cir. 1979), and again in United States v. Birdman, 602 F.2d 547, 549 cert. denied, 444 U.S. 1032 (1980). In Birdman, after looking to earlier federal authority, the court relegated a prosecutor's reading testimony from a prior grand jury to a routine "ministerial act."[12]

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12. See Birdman, 602 F.2d at 549 n.1 (citing United States v. Blitz, 533 F.2d 1329, 1344-1345 (2d Cir.), cert. denied, 429 U.S. 819 (1976)).

Questions of grand jurors' access to witness transcripts were faced again more recently in United States v. Provenzano, supra. Although not confronted with the facts of the instant case, the Provenzano opinion anticipated the issue raised sub judice as one "created by the very nature of the grand jury's investigative role." 688 F.2d at 202. It proposed the solution when it relied on the Seventh Circuit's decision in United States v. Lang, 644 F.2d 1232 (7th Cir.), cert. denied, 454 U.S. 870 (1981). The Lang court stated:

> "Prosecutors can insure that the perception of fairness, as well as its substance, are maintained by giving replacement and absent grand jurors the opportunity to review transcripts...of missed sessions. That should go a long way to ameliorate the concerns raised here." 644 F.2d at 1239 (quoted in Provenzano, 688 F.2d at 203).

In Lang, the transcript issue arose when the government sought to replace grand jurors during the course of a thirty-six month investigation.[13]

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13. Extension of the grand jury's life was permitted pursuant to the Organized Crime Control Act of 1970, 18 U.S.C. §3331.

The Seventh Circuit held that the substitution did not prejudice the defendant's rights because the replacements were sufficiently informed of the previously presented testimony. Although the Provenzano Court recognized the same lack of prejudice to be a factor in that case, it gave a clear signal that the facts of the instant case would be considered in a different light when it quoted the following excerpt from Leverage Funding, supra:

> "The court did concede that there may be a situation where a grand juror missed so much of the evidence that the Fifth Amendment would not permit his vote to be counted, but found no such demonstration had been made here." Provenzano, supra, 688 F.2d at 201) (emphasis added).

Legal authority for the Petitioner's argument runs much deeper, however, than the relatively recent decisions in Lang and Provenzano. As noted previously, the courts of the Eastern District of Pennsylvania have found consistently that matters of grand jury attendance should not pose problems to the government because of the required availability of transcribed witness testimony. See United States v. Camiel, supra; United States v.

Deerfield Specialty Papers, Inc., supra. Chief Judge Lord, the trial judge in the instant case, has spoken out loudly and eloquently on the adequacy of testimony presented to the grand jury. United States v. Mahoney, 508 F. Supp. 263 (E.D. Pa. 1981). In Mahoney, Judge Lord noted that the use of summaries:

> "Highlights the extent of the government's control...and the potential for abuse by prosecutorial manipulation....Economy, however, does not justify the fashioning of shortcuts in criminal prosecution at the expense of the rights of the defendants." 508 F. Supp. at 266-67.

More than ten years before Petitioner's indictment, the Second Circuit faced similar issues in United States v. Estepa, 471 F.2d 1132 (2d Cir. 1972). In Estepa, the court dismissed the defendants' indictment on grounds that the government had taken unnecessary shortcuts in the presentation of evidence to the grand jury. While the Estepa opinion addressed a variety of concerns not germane to this case, its focus was on the government's "casual attitude with respect to the presen-

tation of evidence to the grand jury." Id at 1135. The court found that even if the government's sole motivation in its presentation of hearsay evidence to the grand jury was avoidance of inconvenience, as opposed to something more sinister, the practice was one to be ended.

In the instant case, this Court need not concern itself with the quality of the agent's presentation but rather with the government's accommodation to convenience. The trial court's discovery rulings have given this Court a rare glimpse behind the veil of grand jury secrecy—and as is often the case —we find that the reason for the garment is not purity and modesty, but fear of disclosure.

The government's conceded course of conduct vis a vis absent grand jurors triggers the policy concerns of the supervisory powers of this Court. A grand jury indictment is supposed to avoid the need for a preliminary hearing pursuant to Fed. R. Crim. P. 5(c). There is no doubt that in the instant case the government crossed the threshold of "those minimal historic safeguards for securing trial by reason which are summarized as 'due process

of law' and below which we reach what is really trial by force." McNabb v. United States, 318 U.S. 332, 340 (1943).[14] It is necessary for this Court to purify its own temple by quashing the indictment. See Sorrells v. United States, 287 U.S. 435, 437 (1932).

It bears repeating that facts conceded in the instant case sidestep issues raised by earlier courts concerning the attendance issue. For example, in United States v. Colasurdo, 435 F.2d 585, 597 (2d Cir. 1971), cert. denied, 406 U.S. 917 (1972), the court was concerned with the need for "a preliminary trial to determine not just the sufficiency of evidence on each count but a determination of each juror's presence." The court feared that such concerns would bog down the courts in a "morass, a veritable jungle of speculation and conjecture." In the instant case, there is no reason to either speculate or conjecture. Neither the sufficiency of the evidence nor a determination of the attendance

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14. Quoted in United States v. Birdman, supra, 602 F.2d at 558. Cf. United States ex rel Sturdivant v. New Jersey, 289 F.2d 846, 848 (3d Cir.), cert. denied, 368 U.S. 864 (1961).

records of the grand jurors is at issue. This Court need not direct its attention to such facts. Rather, this Court must review the effect of the government's complacency and cavalier attitude toward the Petitioner's due process rights.

B. Justice Department Guidelines Put The Government On Notice That Absent Grand Jurors Must Hear Testimony Or See Transcripts Of Testimony Before Voting On An Indictment

The federal courts are not the only guardians of the prerogatives of the grand jury. Justice Department guidelines recognize the problem caused by absent grand jurors and suggest the remedy. The United States Attorney's Manual, Title 9, paragraph 11.382 specifically provides:

> "It is good practice, however, to cause a juror who was absent during a significant part of a grand jury presentation to read (or be read) the transcript of the testimony the juror did not hear, or depending upon the circumstances, some lesser measure can be taken to have the gist of the testimony communicated to a juror who had not been present for the testimony."[15]

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15. The Justice Department has yet to define "gist of the testimony."

The unheeded prescriptions of the Justice Department guidelines must trigger further concern by this Court. As was noted under somewhat different circumstances in United States v. Fields, 592 F.2d 638, 647 (2d Cir. 1978), cert. denied, 442 U.S. 917 (1979):

> "The extreme sanction of dismissal of an indictment is justified in order to achieve one or both of two objectives: first, to eliminate prejudice to a defendant in a criminal prosecution; second, to help to translate the assurances of the U.S. Attorneys into consistent performance by their assistants."

In the instant case, the Petitioner seeks nothing more than consistent adherence to Justice Department guidelines.

In both Lang and Provanzano, the courts cited the United States Supreme Court in Wood v. Georgia, 370 U.S. 375, 390 (1962), for the proposition that the raison d'etre of a grand jury is the belief that an independent review by a body of citizens is the best protection from ill-advised and malicious prosecutions. Provenzano, 688 F.2d at 201-02; Lang, 644 F.2d at 1238. In Lang, the court also cited Leverage Funding for the proposition that, lacking

evidence to the contrary, courts must presume that grand jurors have performed their duties. Id.[16] Although as noted, courts may also presume that a grand juror who votes to indict an individual on a particular count has heard sufficient evidence to believe that a trial on that count is warranted —this presumption may be rebutted.

In the instand case, the government cannot hide behind presumptions of a grand juror's knowledge. The absent grand jurors voting to indict Bernard Marcus were clearly and unnecessarily uninformed. The veil of grand jury secrecy has slipped and irremedial warts have been revealed. Something more than a cosmetic is required from this Court. The ointment of harmless error will not cover these blemishes.

III. THE FAILURE OF THE GOVERNMENT TO PROPERLY INFORM EACH GRAND JUROR OF ALL THE EVIDENCE MAKES THIS AN APPROPRIATE CASE FOR THE EXERCISE OF THE SUPERVISORY POWERS OF THIS COURT

The Petitioner confronts this Court with something more than a routine petition for certiorari.

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16. See also Oster v. Aronwald, 567 F.2d 551, 553-54 (2d Cir. 1977).

He has proven to a mathematical certainty that he was indicted by grand jurors who on various counts of the indictment had no knowledge of the government's evidence against him. The prosecuting attorney has conceded that transcripts of witness testimony could have been made available to the grand jurors, but were not. The Petitioner has shown that the failure to utilize those transcripts was contrary to controlling case authority and Justice Department guidelines. The District Court Judge who heard the Petitioner's Motion to Dismiss stated that he was so concerned by the issues it raised that he would not be disappointed to see himself reversed on appeal. Finally, the evidence against the Petitioner is of such timing, nature and quality that he will not escape punishment regardless of this Court's decision.

Federal courts have stated and restated their willingness to exercise their supervisory powers to quash an indictment in order to preserve the "appearance and the reality of fair practice before the grand jury." See, e.g., United States v. Serubo, supra, 604 F.2d at 817. Cf. United States v. Birdman,

supra. Although the Petitioner claims undue prejudice and a denial of due process resulting from the government's actions in this case, such findings are not essential to the court's exercise of its powers. Rather, as the Ninth Circuit stated in United States v. Gonsalves, 691 F.2d 1310, 1316 (9th Cir. 1982):

> "Notions of fair play which are more exacting than the minimum constitutional requirements of due process have been the primary moving force behind the exercise of judicial supervisory power. The doctrine is now commonly invoked to refer generally to the court's inherent power to preserve the integrity of the judicial process.[17]

The Gonsalves case relied on scholarly authortiy which isolated various reasons for the federal courts' powers. Two of the purposes cited by the Ninth Circuit have application to this certiorari petition:

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17. The Third Circuit used similar language in United States ex rel Sturdivant v. New Jersey, supra:

> "Over federal proceedings we may exert a supervisory power with greater freedom to reflect our notions of good policy than we may constitutionally exert over proceedings in state courts." 289 F.2d at 848 (quoting Fay v. The People of the State of New York, 332 U.S. 261, 287 (1947)).

1. Enforcing judicial compliance with already existing standards of fairness; and

2. Avoiding a miscarriage of justice in particular cases where existing procedures have proved inadequate. Id. (quoting Note, Judge Made Supervisory Powers of the Federal Courts, 53 Geo.L.J. (1965)).

Although the Gonsalves test may be considered broader than the Serubo standard of "entrenched and flagrant misconduct," the facts of the instant case and the pattern of conduct which it exemplifies should eliminate all distinctions in a way that the issues arising in this matter are ultimately resolved.

A. Certiorari Should Be Granted To Allow The Court To Determine Whether There Was Compliance With Existing Standards Of Fairness

Although courts may presume that grand jurors are informed because recording of witness testimony has been required since 1979,[18] the experience of this case points to the contrary. In this instance, it is Academia's ivory tower that affords the view of common practice.

> "It is not clear from the language of the rule [6(e)] whether each of

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18. Fed. R. Crim. P. 6(e).

> the indicting jurors must have heard all the evidence offered in support of the indictment. Policy and logic might suggest that this is required, but it does not appear to be." 8 Moore Federal Practice, Par. 6.02[2] (1982) (emphasis added).

The Petitioner contends that it is in his case, where evidence of the government's mishandling of the grand jury is so obvious, that the law must now be made unconditionally consistent with policy and logic. As this Court is well aware, it is only in the rarest of cases that the degree of discovery of grand jury materials permitted by Chief Judge Lord actually takes place. The cadaver is opened and the cause of the infection is revealed.

B. The Dismissal of Petitioner's Indictment Will Void A Miscarriage Of Justice Because Existing Procedures For Enforcement Of Guidelines Concerning The Availability Of Witness Transcripts Have Proven Inadequate

The Justice Department guidelines, which reflected case authority and the duty to provide transcripts to absent grand jurors, were in effect at the time of the Petitioner's indictment.[19] The

19. The page in the Prosecutor's Manual on which the pertinent guideline appears is dated February 17, 1982. That is the latest possible effective date for the guideline.

Assistant United States Attorney's statement that "prosecutors probably do flirt with disaster" indicates that those guidelines have had no effect in the Eastern District of Pennsylvania.

Again, at the time of the grand jury's vote to indict on June 19, 1982, most of the witness transcripts were available, if not accessible. Those transcripts were never presented to the absent jurors. Moreover, there was no pressing need for the prosecutor to present the indictment to the grand jury prior to the transcription of all previous witness testimony. There was no statute of limitations problem or any other government interest requiring presentation of the case to the grand jury on June 19, 1982.

In the final analysis, the government was merely complacent in its knowledge that most of the jurors heard most of the testimony on most of the counts. At the Petitioner's guilty plea hearing, the Assistant United States Attorney stated:

MR. WELSH: "...We feel that the bottom line here is that the jury, a substantial portion of the grand jury in this case, was able to evaluate the case in as fair and practically

equivalent manner as the trial judge or a trial jury if the case were to go to that point.

At the end, each grand juror was asked—not individually, but as a group—if they had any further questions."

In support of this "bottom line" argument, the prosecutor fell back to the highground of "once you've heard the evidence on one count, you've heard the evidence...." The prosecutor evidently felt that there was a danger that the grand jury might hear too much evidence and become rebellious. He continued:

MR. WELSH: "Your Honor, we believe that to a certain extent you can also rely on the fact that in each case of a "payor" the evidence is virtually identical. We made that argument to the grand jury, and we are prepared to make it to any trier of fact in this case; that is, that there are some astonishing similarities in the overall course of conduct. In other words, it's not like we have a very, very diverse group of extortion victims or extortion-type victims. Rather, <u>in each case it was virtually the same, and the grand jury might become even rebellious at a certain point in hearing all that</u>, though that does not excuse them from their obligations." (emphasis added).

It is unlikely that this Court will ever be presented with a better view of lax grand jury practice and the reasons for it. Moreover, the usual harm to the public interest attendant to the dismissal of an indictment is not present in the instant case. Petitioner does not contest the sufficiency of evidence to support his guilty plea.

This Court is not faced with the choice between "two evils: On the one hand, the evil that the government should play an ignoble part, and on the other, that some criminals should escape." See United States v. Birdman, supra, 602 F.2d at 559 (quoting United States v. Olmstead, 277 U.S. 438, 470 (Holmes, J., dissenting)). The situation faced by the Court in the instant case is closer to that recognized by Judge Medina in his dissent in United States v. Beltram, 388 F.2d 449, 453 (2d Cir.), cert. denied sub nom. Malofsky v. United States, 390 U.S. 1017 (1968). Judge Medina recognized the dismissal of an indictment for what it was. He stated:

> "This would not let appellants go scot free, as there would be time to reindict them and have their guilt or innocence passed upon again on a record not tainted

with irregularity." 388 F.2d at 453.

The Petitioner submits that the matter sub judice presents the Court with a situation similar to that faced in United States v. Serubo, supra. The vote of "uninformed" grand jurors is one frought with potential abuse. As the court stated in Serubo:

> "Where the potential for abuse is so great, and the consequences of a mistaken indictment so serious, the ethical responsibilities of the prosecutor, and the obligation of the judiciary to protect against even the appearance of unfairness, are correspondingly heightened." 604 F.2d at 817.

The Petitioner argues that there is an even greater potential for abuse in the instant case than in Serubo. A vote to indict has been submitted to uninformed grand jurors. Something much more sinister than ill-advised commentary has floated to the surface. The lax presentation of evidence leading to Petitioner's indictment reveals the ultimate potential for improper manipulation of the grand jury. Historical safeguards have truly become a thing of the past.

The failure of the United States Attorney's Office for the Eastern District of Pennsylvania to adhere to judicial precedent and its own departmental guidelines indicates that additional "judicial tongue clicking" and "adjurations as to the better practice" are likely to have little impact on this problem. See Serubo, supra, 604 F.2d at 818 (quoting United States v. Agee, 597 F.2d 350, 371 (3d Cir. 1979) (en banc) (Gibbons, J., dissenting)). Only the exercise of this Court's supervisory powers and the dismissal of this indictment will convince the United States Attorney of the severity of the government's misconduct.

A per se rule precluding indictments where absent grand jurors have been permitted to vote true bills when they have heard no evidence will work no hardships on the government. The United States Attorney has the transcripts, now he must use them.

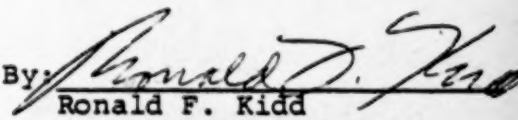
VI. CONCLUSION

The Petitioner prays that the Court will grant this Writ so as to facilitate the exercise

of its supervisory powers to dismiss the indictment voted against him by absent grand jurors who heard no supporting evidence. He asks this Court to find that absent grand jurors who vote a true bill without reference to available transcripts of witness testimony is an unnecessary denial of due process serving no public interest. The Petitioner urges that this Court rule that henceforth no indictment take place when absent grand jurors are denied access to grand jury transcripts prior to their vote to indict.

Respectfully submitted,

DUANE, MORRIS & HECKSCHER

By: 

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APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 82-1849

UNITED STATES OF AMERICA

v.

BERNARD J. MARCUS,

Appellant

On Appeal from the United States District Court for the Eastern District of Pennsylvania
(Crim. No. 82-00206)
(Hon. Joseph S. Lord, III)

Submitted Under Third Circuit Rule 12(6)
July 18, 1983

Before: ADAMS and HIGGINBOTHAM, Circuit Judges, and TEITELBAUM, District Judge

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JUDGMENT ORDER

After considering all contentions raised by appellant, namely, that (1) he suffered actual prejudice because absent jurors voted to indict him on counts on which they heard no evidence; (2) the

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* Hon. Hubert I. Teitelbaum, United States District Court for the Western District of Pennsylvania, sitting by designation.

government's longstanding failure to provide available transcripts to absent grand jurors is contrary to Justice Department guidelines and judicial admonition and demands the exercise of this Court's supervisory power to dismiss the defendant's indictment, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

s/C.A.
Circuit Judge

ATTEST:

s/S.M.
Sally Mrvos, Clerk

DATED: July 26, 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CRIMINAL NO. 82-00206

v. :

BERNARD J. MARCUS :

O R D E R

AND NOW, this 28th day of October, 1982, it is hereby ORDERED that Defendant's motion for inspection of attendance records of the Grand Jury, but not the names of the grand jurors, be and is GRANTED. In all other respects the motion is DENIED.

s/J.S.L.
Joseph S. Lord, III S.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :

v. : CRIMINAL NO. 82-00206

BERNARD J. MARCUS :

O R D E R

AND NOW, to wit, this 16th day of December, 1982, it is hereby ORDERED that the attached stipulation is hereby sealed and impounded.

BY THE COURT:

s/Lord
Lord, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :

v. : CRIMINAL NO. 82-00206

BERNARD J. MARCUS :

STIPULATION

It is hereby stipulated between the parties as follows:

1. The records of the Clerk of Court, United States District Court for the Eastern District of Pennsylvania, show that the following grand jurors, as identified by randomly assigned numbers, were absent on the listed dates from the grand jury impanelled by the Honorable Alfred L. Luongo on December 8, 1981:

DATE OF SESSION	TOTAL JURORS IN ATTENDANCE
March 9, 1872 Panel of 23 All jurors in attendance	23
March 16, 1982 Panel of 23 All jurors in attendance	23

DATE OF SESSION	TOTAL JURORS IN ATTENDANCE
March 30, 1982 Panel of 23 Absent #1,#10,#15,#22	19
April 6, 1982 Panel of 23 Absent #1,#2,#6,#10	19
April 13, 1982 Panel of 23 Absent #3,#10	21
April 20, 1982 Panel of 23 Absent #2,#6	21
April 27, 1982 Panel of 23 Absent #4,#19	21
May 4, 1982 Panel of 23 Absent #9,#16	21
May 11, 1982 Panel of 23 Absent #9,#11,#14,#15,#16,#19	17
May 18, 1982 Panel of 23 Absent #1,#9,#10,#19	19
May 25, 1982 Panel of 23 Absent #1,#9,#19	20
June 15, 1982 Panel of 23 Absent #1,#12,#19	20

DATE OF SESSION	TOTAL JURORS IN ATTENDANCE
June 22, 1982 Panel of 23 Absent #4,#13,#19	20
June 29, 1982 Panel of 23 Absent #2,#9,#19,#21	19

2. The above-captioned indictment was returned on the basis of the sessions before the grand jury described in paragraph 1 and the following witnesses testified during the government's presentation of the basis for the specific charges in the indictment:

DATE	
March 9, 1982	David Blanck Lester Rosenfeld Benjamin Strauss
March 16, 1982	Special Agent David Gentile, FBI Robert Reichlin
March 30, 1982	Leonard Buten Robert Dee Edward Rosen
April 6, 1982	William Platt
April 13, 1982	Eugene Chaiken Mary Dorwart
April 20, 1982	Sidney Weinberg Special Agent Robert Walker, IRS

DATE	
April 27, 1982	Steven Becker Marvin Katz Leonard Wasserman Richard Leff
May 4, 1982	Herbert Garde Leonard Pasternack Theodore Roberts Samuel Simon
May 11, 1982	Joseph Garde
May 18, 1982	John Jungers
May 25, 1982	Jack Davidson
June 15, 1982	Norman Davidson Robert Goldenberg
June 22, 1982	James Brockwell Harold Newman Bernard Paul
June 29, 1982	Max Krenzel Special Agent David Gentile, FB Special Agent Robert Walker, IR

s/B.J.M.
BERNARD J. MARCUS

s/P.F.V.
PETER F. VAIRA
United States Attorney

s/R.F.K.
RONALD F. KIDD, Esq.
Counsel for
Bernard J. Marcus

s/R.E.W.
ROBERT E. WELSH, JR.
Assistant United States
Attorney

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BEFORE THE FEDERAL GRAND JURY

Stenographic transcript of proceedings had and evidence before the Federal Grand Jury of the United States District Court for the Eastern District of Pennsylvania, held in the Federal Courthouse, Room 4716, 601 Market Street, Philadelphia, Pennsylvania, on Tuesday, June 29, 1982, commencing at 10:21 A.M., E.D.S.T., before Lloyd J. Amodei, Registered Professional Reporter, in and for the Commonwealth of Pennsylvania.

TESTIMONY OF: AGENT DAVID GENTILE

PRESENT:

ROBERT E. WELSH, ESQUIRE
Assistant United States Attorney

LLOYD J. AMODEI, Court Reporter, Sworn.

AGENT DAVID GENTILE, after having been first duly sworn, was examined and testified as follows:

BY MR. WELSH:

Q. Agent Gentile, I neglected to bring out some testimony from Mr. Krenzel. It was pointed out to me that I ought to correct that.

Is it correct that Mr. Krenzel was given immunity by Judge Pollak?

A. Yes, sir, that's correct.

Q. I am going to ask you, we have a draft of the indictment. I am going to ask you to describe the basis of where the evidence is for certain allegations. I will read it, then ask you what the basis is.

Paragraph 1 says that, "From in or about 1954 up until the date of this indictment, Bernard J. Marcus, Defendant, was an employee —"

MR. WELSH: Why don't we cut this off, members of the Grand Jury. I will be back later today. Joe Gontram is ready.

(Whereupon the hearing was adjourned at 10:22 A.M.)

(Whereupon the hearing was resumed at 2:39 P.M.)

BY MR. WELSH:

Q. Agent Gentile, you are still under oath. Do you have a copy of the indictment?

A. Yes, I do.

Q. The first paragraph states that Mr. Marcus had been a business agent from 1954, at least, until the date of this indictment. What is the basis for that allegation?

A. The documents that I was able to secure, specifically union documents which showed his tenure as a union official, also interviews that I had conducted with union officials who were aware of his position in the union.

Q. Turning to number 2, is the same information the basis for the allegation that he was an officer, that is, secretary-treasurer?

A. Yes, sir, that's correct.

Q. By documents, are you referring LM-2 forms filed with the Labor Department?

A. That's correct.

Q. Paragraph 3, are you familiar with Local 169 as a legal entity, and is that where its office is?

A. Yes, I am.

Q. By the way, do you know approximately how many members are in that union?

A. If I'm not mistaken, and again I'm not offering speculation, but I believe there are about seven thousand members in that local.

Q. Let's skip the allegation Number 4 for the time being.

Number 5, the members of the Grand Jury have already heard the testimony from the witnesses that the corporations employed these people.

Number 6, however, that all the corporations engaged in interstate commerce. Is it correct that a substantial portion of the business of each of these corporations named here crossed State lines, that is, they bought and sold items in interstate commerce?

A. Absolutely. This is one of the first things we determined in our interviews of each of the victims in these cases. Basically to determine the nature of their business and how they did business.

Q. Therefore, allegation Number 4, that Local 169 was an enterprise which engaged in, and the activities of which affected, interestate and foreign commerce would be correct based upon the organizations and businesses that they operated?

A. Yes, it would.

MR. WELSH: Now, members of the Grand Jury, Paragraph 7 is one of the basic paragraphs. I am going to read it to you.

"From in or about 1954, up to and including January, 1982, at Philadelphia, and elsewhere in the Eastern District of Pennsylvania, Bernard J. Marcus, being employed by and associated with an enterprise engaged in, and the activities of which affected, interstate and foreign commerce, that is, Local 169, did knowingly and willfully conduct and participate in, directly and indirectly, the affairs of that enterprise through a pattern of racketeering

activity, that is, he received money and property from employers of members of Local 169 through the use of fear of economic loss, as described in the acts of racketeering charged in Counts Two through Thirty-One."

You will note that A is a Hobbs Act allegation, based on Sidney Weinberg, who you heard from some time ago.

B is the Taft-Hartley component of Sidney Weinberg.

C is Lionel Leisure, Marvin Katz. That would be C and D.

E is another situation which we did not ask you to consider the Hobbs Act. You recall this is Mr. Pasternak from Ideal Shoe and you recall that the initial contact was made by somebody who is now dead. A man named Marcus, as I recall, Marvin Marcus or something. Meyer Marcus. Therefore, there would be no evidence to show what the initial contact was. Therefore, we do not ask you to consider that to be a Hobbs Act.

If you turn the page to Paragraph 8, is simply what we call a forfeiture Count. This is based

upon the fact that statute provides that upon a verdict of guilty on the Reco, [sic] that is the first Count, the defendant can be forced to lost the elective position and appointed position of the union. It is not forever. It would only be the present position. He could in turn run next year if he were to so choose.

Then we pick up with Count Two on Page 7. This is Almo Electronics. You will note it names Eugene Chaiken.

BY MR. WELSH:

Q. Agent Gentile, in these Counts when there is a set of dates given, how is that calculated, briefly?

A. Well, basically when we had a victim indicate to us a particular year or at least a year he assumed or to the best of his recollection that he started paying Mr. Marcus, up until a time whatever that year might have been, we usually gave the individual the benefit of the doubt, rather than stretch the years for payments we tried to narrow them down.

Let's say someone paid from 1972 to 1981. They assumed they paid from that period of time.

Well, we might have gone from 1973 to 1980 or 1972 to 1978, depending on the years.

Q. Simply, did you calculate conservatively the amount given for the total there?

A. Oh, absolutely. I think in most instances where we debriefed our victims, the amount paid was very conservatively figured for a total amount.

MR. WELSH: Now turning to Count Three, which would be the Taft-Hartley component, you will note there that charges a single payment.

Members of the Grand Jury, I think I explained to you how legally each payment constitutes a separate violation of the Taft-Hartley Act. Whereas the Hobbs Act, it is the entire course.

BY MR. WELSH:

Q. In each case for the Taft-Hartley, is it correct that a payment at or near the end of the payment period, such as the last payment was used?

A. Yes.

MR. WELSH: Count Four, members of the Grand Jury, you will recall David H. Blanck, president of the company, paid in cash installments by David

H. Blanck and Stanley Blanck. Do you recall him telling you that?

BY MR. WELSH:

Q. Agent Gentile, did you interview Stanley Blanck?

A. Yes, I did.

Q. Did he corroborate and essentially acknowledge the same thing his brother testified to?

A. Yes.

Q. And will be available to testify?

A. Yes. We have a written statement in our files attesting to his statements.

MR. WELSH: Count Seven would be the Taft-Hartley component of that, charging the final $500 payment. Count Six would be M. Buten and Sons. You recall Leonard Buten, members of the Grand Jury? You never knew that, the paint company?

THE FORELADY: Yes.

MR. WELSH: Count Seven is a Taft-Hartley charge based upon his testimony. $500 cash payment. You will note that is the last of the company payments coming up until December of 1981.

Dee Paper, do you recall Robert Dee?

BY MR. WELSH:

Q. Agent Gentile, is it correct that Robert Dee testified for at least a portion of the period he was paying Frank Keane?

A. Yes, he did.

MR. WELSH: Do you recall his testimony, members of the Grand Jury?

GRAND JURY: Yes.

BY MR. WELSH:

Q. Is it correct, Agent Gentile, that that $18,500 estimate takes that into account, that is, that Mr. Marcus is not charged with having received that?

A. Yes. There was a discrepancy in the years where he allegedly was paying Keane. And when he restarted paying Mr. Marcus, again the figure is very conservative figure.

MR. WELSH: Members of the Grand Jury, you will look at the bottom in violation of Title 18, United States Code, Section 1951 of the Hobbs Act, and Section 2(a). Section 2(a) is the only

Count that has that. Section 2(a) says that anybody who is an aider and abettor and willfully associates himself and advances from illegal enterprise or illegal effort, is guilty as a principle.

It just means that if you assist knowingly in an illegal act, you are guilty just as if you did it by yourself. This is to red flag for you and any other Jury that this Count, some of the money went directly to Mr. Keane. We would argue that the initial contact was made by Mr. Marcus and therefore he would be guilty as an aider and abettor at least.

Of course Nine is Taft-Hartley.

J.W.S. Delavau Company, Richard Leff; do you remember him? Pharmaceutical company.

Eleven is the Taft-Hartley component of that.

Now, Count Twelve, which would be Norman Davidson. Do you recall the testimony of Jack Davidson who said he was paying from about 1970 or 1972 until 1976? Then Mr. Norman Davidson said how he began to pay when Mr. Marcus made a relatively strong, if you recall, contact.

In this Count we have eliminated Jack Davidson, because if you recall he was a little vague as to how the initial contact was made. But Mr. Norman Davidson, you will recall, unless you want me to get the transcript for you, was relatively affirmative what he said happened. Therefore, out of conservatism we eliminated that.

Norman Davidson testified that he paid approximately fifteen, eighteen, $2,000.

In terms of the pleading rules, the Government is required to show with reasonable accuracy dates and amounts. So, it would not be a credible feature just something that has to be reasonably accurate. Same with the tax Counts, which we will get to.

Count Fourteen with Max Krenzel. You recall testified as paying for three years, two years.

Let me take this opportunity to point something out to you, Members of the Grand Jury. You will note in the case of Oxford Sales that Count Fourteen charges that Mr. Marcus did object commerce by extortion, that is, by obtaining the sum of money from Oxford Sales from the company. Well, remember Mr. Krenzel told you that the money came

out of the company. One of the Grand Jurors pointed that out. That makes a difference. I will explain that in a moment.

Count Fifteen is the Taft-Hartley charge.

Count Sixteen, Bernard Paul, from B. Paul Model Distributors. We allege in this case he is charged with that he obtained cash payments from Bernard Paul. In this case and in many others, in fact most, the witnesses testify that they took it out of their own pockets. Others didn't. For example, Eugene Chaiken from Almo said they took it from the company.

The difference in that is this: For the purpose of the interstate commerce element, the diminution or reduction or lessening of the assets of a company engaged in interstate commerce will satisfy the commerce element. Under the theory there is less assets available to engage in commerce. It is a matter of law.

The commerce element can also be satisfied by evidence that the threatened harm, that is the possibility of strikes and grievances would impinge upon interstate commerce and would be satisfied

under the law by evidence that these witnesses believed and that the companies would have actually suffered some sort of problem reducing their ability to conduct business if they had a strike. And that is the witnesses testified [sic] that is in fact what they feared.

That explains the differences in the wording.

Count Nineteen then would be the Taft-Hartley.

Pep Boys, do you recall the payments were made by two people, Lester Rosenfeld and Benjamin Strauss.

Nineteen is the Taft-Hartley component of that.

Count Twenty, Pioneer Oil. So you recall Sam Simon, the man with the goatee, the gray-haired man, do you recall? $1500 on the eve of his contract; do you recall that? This is Twenty and Twenty-One.

Twenty-Two and Twenty-Three would be Edward Rosen. Do you recall Raymond Rosen? That would be way back. Once again, this charges that the money came out of Mr. Rosen's pocket.

Twenty-Four, Ted Roberts. Do you recall the man who testified about United Research Labs, a

relatively slight man, who testified his business is pharmaceuticals and they were in development and distribution? You do recall? That is Twenty-Four and Twenty-Five.

Twenty-Six and Twenty-Seven, the West Philadelphia Electric Supply.

Sir?

GRAND JUROR: How did you split up the amounts between the two violations for each person?

MR. WELSH: Let me ask Agent Gentile.

BY MR. WELSH:

Q. Is it correct, Agent Gentile, that the amount in the Hobbs Act is the calculation or estimate for the entire course of payment?

A. Yeah.

Q. From beginning to end.

A. Yes. Or as Mr. Welsh stated, when we calculated the extortion situation, we took into consideration all of the monies paid by a victim to Mr. Marcus.

Q. And the Taft-Hartley, is it correct that the Taft-Hartley amount is simply the estimate of what the final payment was?

A. That's correct.

MR. WELSH: That may seem an inconsistency, but under the law, the Courts have held that the appropriate unit of prosecution for the Taft-Hartley Act is each payment, because the law is directed towards prohibiting the mere payments, whereas, the payments themselves are the evil that is sought to be eliminated. Whereas, under the Hobbs Act, it is the entire extortion, the entire use of the fear. Therefore, the Courts have held it is different. So, that is something we have to live with and I think it readily understandable.

GRAND JUROR: In the Taft-Hartley, then each individual payment would not be a separate Count then?

MR. WELSH: It could be. And we could have one -- each and every payment that you have heard about could be a separate Count. But as a practical matter, there is no need to have a thousand Counts. Repetitive Counts, that is, one per witness, should be such for the purposes of portraying what actually happened here.

Now, the reason for the last payment, we could have picked any. We would have picked the

earliest. But in each case, at least on the last payments the witnesses are more sure as to when it happened and the amount.

The statute would be five years from today. You will note in each Taft-Hartley payment is within the last five years. For the Hobbs Act, the initial payment started in many cases. And on Count Twenty-Six, the Count started in 1954. As long as they continued with up to the the last five years and in this case the witness said it was up to as late as 1981, that would be within the period of limitations.

Once again, the unit of prosecution as a whole thing.

GRAND JUROR: If it continues, then you can bring them all in the Count.

MR. WELSH: That's correct. As long as the fear is continuing, the same course of conduct.

BY MR. WELSH:

Q. Now, Agent Gentile, Count Twenty-Six charges that from 1954 to 1981 Mr. Marcus extorted from 500 to $1000, regular cash payments of those amounts

from Sol Newman and Harold Newman. Is it correct that Sol Newman has not testified and has not been debriefed and essentially incapacitated medically?

A. That's correct.

MR. WELSH: Members of the Grand Jury, you will recall Mr. Harold Newman, the brother, testified that the initial contact was made to his brother and explained what happened. You can consider that for the truth of what Sol would say. Harold Newman explained that his brother came to him and they essentially split the money thereafter. Then when Sol retired, for mental reasons, Harold took over.

You will note on Count Twenty-Seven the last payment was from Harold Newman.

Count Twenty-Eight, West Wholesale Drug Company.

BY MR. WELSH:

Q. Agent Gentile, you will note in this Count there were other considerations extorted. What are these things?

A. Well, basically, were told [sic] by Herbert Garde that Mr. Marcus made it a practice of helping

himself to inventory at West Wholesale Drug, and that on three or four occasions each year he would send up a list of items for his personal and family use. And the amount varied from fifty to a hundred dollars per solicitation of items. But basically, he was helping himself to the inventory.

He was not billed, because he basically stated that he didn't want a bill from West Wholesale Drug or Mr. Garde.

MR. WELSH: Can I ask you to turn to Count Two, which would be on Page 7, members of the Grand Jury. It is Almo Electronics.

BY MR. WELSH:

Q. There is an allegation there, Agent Gentile, that Mr. Marcus obtained the sum of approximately $21,600 and other considerations such as electronic components. Once again, was this based upon the statement of Mr. Chaiken?

A. Yes. Mr. Chaiken stated to us that on at least two occasions that I recollect at this time Mr. Marcus helped himself to various electronic equipment, and accessories.

Q. Did Chaiken send a bill at any time?

A. Yes. Mr. Chaiken initially sent a bill to Mr. Marcus which was promptly returned with admonition, "Don't ever send me a bill again."

Q. Mr. Chaiken took the hint.

A. Yes.

MR. WELSH: Now, we are up to, I believe, Twenty-Nine. Once again, that is the testimony of Joseph Garde, members of the Grand Jury.

Thirty. Do you recall Robert Reichlin? I don't know if I even handled Reichlin, of Zuckerman-Honickman; do you recall? In this case you will recall he testified that it was in June of each year.

Thirty-One is the same.

That brings us to Count Thirty-Two, Mr. Goldenberg. Mr. Goldenberg, friend of the people.

In defense, I might point out that you will recall the initial contact was made. He testified that the initial contact was made with his predecessor. He knew payments were being made. So, therefore we have no evidence as to what that contact was. And but his motivations you heard.

And he stands in stark distinction and contrast to the others. Before I get --

GRAND JUROR: On the Hobbs Act, it doesn't matter if you don't have a sum total?

MR. WELSH: That is a pleading problem. Let me explain the -- I will get the facts out and it will tell you the legal issue.

BY MR. WELSH:

Q. Is it correct, Agent Gentile, some witnesses did not know when the payments went up but knew they went up over a period of years?

A. Yes. Some of our victims had a great deal of difficulty recollecting payments over a twenty, twenty-five year period of time. In some instances over a ten to ten or thirteen-year period of time. Again, given the fact that some were very emotional about this whole experience, we did not want to press them. Basically it was to the best of their recollection.

MR. WELSH: For example, members of the Grand Jury, you will look, let me give you an example of one of those, the Newmans, on Page 31. You will

recall Harold Newman believed it was $500 in 1954, knew that it went up to a thousand but cannot say exactly when. Therefore, rather than come up with a calculation that might be prejudicial either way, the allegations are that there was a range.

Now, from a legal point of view, from a pleading problem, the Government will make available the evidence that it has. We will make available to anyone under our Rules of Pleading and Discovery, which means showing your case to the other side, the evidence that we have. We are required to be reasonably specific when we can. It would not bar a case simply just because we did not know exactly the value of it. But however striving to be specific we did it when we could.

Now, a couple of questions that were brought to me. Let me leave the tax Counts until Agent Walker can come in.

BY MR. WELSH:

Q. Agent Gentile, questions have been brought to my attention as to the existence of any other payors, that is, any other employers. You have contacted a number of employers who have in fact denied any

payments were made.

A. That's correct.

Q. In fact, some of the employers in this case who have testified in this case who testified before the Grand Jury denied they paid Mr. Marcus?

A. I would say a sizable number of them did.

Q. What are your plans now, after this indictment is returned, in terms of those other employers?

A. Well, I am still looking at the possibility of ten or fifteen additional employers, many of whom I have already spoken to once. But in the essence of time and in strategy I have not re-interviewed. However, assuming that we have an indictment of Mr. Marcus, within the next week, I intend to resume my interviews of many of those employers and others that I have not spoken to with regard to payments to Mr. Marcus by them.

MR. WELSH: Members of the Grand Jury, a legal point. If other employers are found, we will be permitted and would plan on presenting you with what we call a superseding indictment, assuming one is returned. And we would ask you at that point to add Counts. In other words, that is something

that the Government is able to do, and we would do it assuming we had a reasonable and fair amount of time before any trial. In other words, we would not do it at the last minute. But it is something we would and have done and in a case like this, may do, depending upon how the evidence comes out.

GRAND JUROR: Do you have plans or does your office have plans to conduct investigations into possible payments of other Business Agents representing other companies?

THE WITNESS: There have been allegations with regard to payments to two other Business Agents, I would underscore allegations. I have not verified or substantiated those allegations other than I conducted a couple of interviews which did not satisfy my requirements for pursuing those allegations at that time.

Now, again, I would call to your attention the fact that we had numerous employers testifying and in the essence of time and bringing before you the facts related to Mr. Marcus, I pursued that vigorously, but I will again turn my attention to

not only other employers who might have paid other Business Agents as well as other peripheral matters that will be an outgrowth of this case.

GRAND JUROR: Is Marcus the only Business Agent for 169?

THE WITNESS: No, sir. Business Agents, I believe there are eight or nine of them.

BY MR. WELSH:

Q. By the way, tell us about the changes in the union hierarchy recently.

A. After Mr. Keane's untimely death, Andy O'Hara, who was the senior official in terms of service, assumed the presidency shortly after Mr. Keane's, Ralph Edmonds, who was the recording secretary, and who was to be elevated after Mr. Keane's death to the presidency, he died. And this caused another vote among the Business Agents and Mr. Lyons, Joe Lyons, was elected Vice-President.

So basically now you have Mr. O'Hara as President, Mr. Lyons as Vice-President, Mr. Marcus as Secretary-Treasurer and the Recording Secretary, I believe, is Mr. Brockwell, whom appeared before this Grand Jury last week.

MR. WELSH: Do you recall Mr. Brockwell?

GRAND JUROR: The offices are elected by the Business Agents?

THE WITNESS: With regard to an untimely death or something that occurs within their tenure of service, replacement individuals are voted upon by the officers of the union. However, the -- every -- I think it's every four years, the President -- a slate of officers has to be elected by a membership.

MR. WELSH: Any more questions of Agent Gentile?

(No response.)

(Witness excused.)

(Whereupon the hearing was concluded at 3:05 P.M.)

C E R T I F I C A T E

Commonwealth of Pennsylvania :
SS.
County of Philadelphia :

I, Lloyd J. Amodei, Registered Professional Reporter-Notary Public within and for the County of Philadelphia, Commonwealth of Pennsylvania, do hereby certify that the foregoing hearing was taken pursuant to notice before the Federal Grand Jury of the United States District Court for the Eastern District of Pennsylvania, held in the Federal Courthouse, Room 4716, 601 Market Street, Philadelphia, Pennsylvania, on Tuesday, June 29, 1982, beginning at 10:21 A.M.; was reported in shorthand by myself and reduced to typing under my direction and control; that the foregoing is a true and correct transcription of the testimony; that I am not related to or employed by any of the parties, or their attorneys or agents, or interested directly or indirectly in the matter in controversy either as counsel, attorney, agent or otherwise.

IN TESTIMONY WHEREOF I have here unto set my hand and affixed my seal of office at Philadelphia,

in said County this day of July, 1982.

Lloyd J. Amodei

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of September, 1983, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Rex E. Lee, Solicitor General, Department of Justice, Washington, D.C. 20530. I further certify that all parties required to be served have been served.

Ronald F. Kidd
Duane, Morris & Heckscher
One Franklin Plaza
Philadelphia, PA 19102
Attorneys for Petitioner,
Bernard J. Marcus

Sworn to and subscribed
before me this 21st day
of September, 1983.

Notary Public

BERNADETTE J. SCOTT
Notary Public, Phila., Phila. Co.
My Commission Expires July 16, 1984

Office-Supreme Court, U.S.
FILED
DEC 27 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-499

In the Supreme Court of the United States

OCTOBER TERM, 1983

BERNARD J. MARCUS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

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BERNARD J. MARCUS, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends (Pet. 30-50) that the district court should have dismissed the indictment under its supervisory power because some grand jurors did not attend one or more grand jury sessions and were not furnished transcripts of the missed proceedings. He also claims (Pet. 19-30) that he suffered actual prejudice from the occasional absence of grand jurors.

Upon his conditional plea of guilty in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on 38 counts charging extortion, racketeering, unlawful receipt of payments by a labor official, and income tax evasion, in violation of 18 U.S.C. 1951 and 1962(c), 29 U.S.C. 186(a)(2), (b)(1), and (d), and 26 U.S.C. 7201. Petitioner was sentenced to four years' imprisonment and a $25,000 fine on the racketeering count, to be

followed by concurrent terms of five years' probation on the remaining counts. The court of appeals affirmed by judgment order (Pet. App. 1a-2a).

1. Petitioner, a business agent of Teamsters Local 169, was also the secretary-treasurer of the union. The indictment charged (C.A. Supp. App. 1a-49a), the government proffered evidence at the guilty plea hearing to prove, and petitioner acknowledged in pleading guilty, that petitioner extorted regular cash payments from at least 17 companies that employed members of Local 169. Petitioner also did not declare as income the payments he received in exchange for "labor peace" (C.A. Supp. App. 63a-69a, 87a-88a).

2. Prior to trial petitioner filed a Motion to Dismiss the Indictment or in the Alternative for Discovery of Matters Pertaining to the Grand Jury. The district court directed the government to disclose attendance records of the grand jury. The records, and two charts prepared by the government and stipulated to by petitioner (Pet. 9-10; Pet. App. 5a-7a), indicated that the 38-count indictment was returned by 19 grand jurors. Of the 19 jurors, 7 attended all 14 sessions of the grand jury. However, at least 17 jurors were present at each session, and at least 15 jurors heard testimony relevant to each count.[1] Finally, although the prosecutor did not furnish the absent jurors with transcripts of the sessions they missed (C.A. Supp. App. 43a), at the final session the FBI case agent and an IRS agent summarized the nature of the testimony previously heard on each count (*ibid.*).

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[1]The two charts presented to the district court, when read together, demonstrate the following: All 19 jurors heard evidence relevant to counts 4, 5, 14, 15, 18, 19, 30, and 31, presented on March 9, March 16, and June 29. Eighteen of the 19 jurors heard all the evidence with respect to 12 other counts (counts 10, 11, 20, 21, 24, 25, 33, 34, 35, 36, 37, and 38). Seventeen jurors heard all of the evidence introduced on 9 counts (counts 2, 3, 12, 13, 16, 17, 26, 27, and 32). Sixteen jurors heard evidence addressed specifically to the RICO count (count 1), and 15 jurors heard all of the evidence on counts 6, 7, 8, 9, 22, 23, 28, and 29.

3. Petitioner contends (Pet. 20-30) that the government's failure to furnish absent jurors with transcripts of the proceedings they missed prevented the grand jury from being informed on the counts upon which it indicted petitioner. However, as to each count, at least 15 of the 19 jurors voting to return the indictment had also been present when the evidence relevant to that count was offered. Fed. R. Crim. P. 6(f) requires that "[a]n indictment may be found only upon the concurrence of 12 or more jurors." Thus, each count was found by a sufficient number of informed jurors to satisfy the Rule, and petitioner was accordingly indicted on all counts by a properly informed grand jury.

Petitioner's claim of "actual injury" (Pet. 25) is consequently reduced to the allegation that, of the 19 jurors who voted to indict, a few may have voted for counts on which they heard only a brief summary. Because those votes did not result in an indictment that would otherwise not have been returned, this claim of "actual injury" is without substance.[2]

The courts of appeals have uniformly refused to dismiss indictments even when fewer than 12 grand jurors were present at all of the grand jury sessions. See *United States* v. *Provenzano*, 688 F.2d 194, 201-202 (3d Cir. 1982), cert. denied, No. 82-763 (Dec. 6, 1982); *United States* v. *Godoy*, 678 F.2d 84, 86 (9th Cir. 1982), cert. denied, No. 82-538 (Nov. 7, 1983); *United States* v. *Lang*, 644 F.2d 1232, 1235-1239 (7th Cir.), cert. denied, 454 U.S. 870 (1981); *United States* v. *Leverage Funding Systems, Inc.*, 637 F.2d 645, 647-648 (9th Cir. 1980), cert. denied, 452 U.S. 961

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[2]Petitioner complains (Pet. 25) that, because they were uninformed, the jurors "could not participate intelligently in deliberations." However, since under Fed. R. Crim. P. 6(f) no more than 12 jurors need vote to return the indictment, those extra jurors' inability to participate intelligently would have no effect on the validity of the indictment.

(1981); *United States* v. *Colasurdo*, 453 F.2d 585, 596 (2d Cir. 1971), cert. denied, 406 U.S. 917 (1972); *Lustiger* v. *United States*, 386 F.2d 132, 139 (9th Cir. 1967), cert. denied, 390 U.S. 951 (1968); *United States ex rel. McCann* v. *Thompson*, 144 F.2d 604, 607 (2d Cir.), cert. denied, 323 U.S. 790 (1944); *United States* v. *Pastor*, 419 F. Supp. 1318 (S.D.N.Y. 1975); *United States* v. *Armour & Co.*, 214 F. Supp. 123, 124 (S.D.Cal. 1963); cf. *United States* v. *Anzelmo*, 319 F. Supp. 1106, 1115 (E.D. La. 1970). In light of those decisions, there is no reason to require a broader remedy here, when a sufficient number of jurors heard the evidence relevant to each count returned by the grand jury.[3]

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[3]Relying on the Third Circuit's exposition in *United States* v. *Provenzano*, 688 F.2d at 203 n.1, petitioner contends that the court should have dismissed the indictment because the prosecutor did not provide absent jurors with transcripts of missed testimony. The court of appeals, adopting the Seventh Circuit's reasoning, recognized the remedial effect of "giving replacement and absent grand jurors the opportunity to review transcripts * * * of missed sessions." 688 F.2d at 203 (quoting *United States* v. *Lang*, 644 F.2d at 1239). Accordingly, the court suggested that "furnishing transcripts to absent jurors is a practical way to avoid attacks on grand jury voting in the future." *Ibid.* By its very language, the *Provenzano* court suggested that the remedy was to be prospectively applied to future grand juries. That decision came down in September 1982, almost three months after the instant indictment was returned.

Even assuming, arguendo, that the court of appeals in *Provenzano* informed the government that it risked dismissal under the court's supervisory power if it failed to furnish transcripts to absent jurors, exercise of that authority would be singularly inappropriate in this situation. First, as noted above, at least 12 jurors heard all the evidence as to each count, so the jury was not uninformed without the transcripts. Moreover, courts have also recognized the value of summaries to fill in gaps in missed testimony. *United States* v. *Lang*, 644 F.2d at 1239. Here, the abbreviated summations at the final grand jury session by the FBI case agent and the IRS agent capsulized both petitioner's

Finally, petitioner concedes (Pet. 7) that the government presented sufficient evidence to support the indictment. He contends nonetheless that the indictment should be dismissed under the court's supervisory power (Pet. 30-50). However, as this Court recently recognized, "[s]upervisory power to reverse a conviction is not needed as a remedy when the error to which it is addressed is harmless since by definition, the conviction would have been obtained notwithstanding the asserted error. Further, in this context, the integrity of the process carries less weight, for it is the essence of the harmless error doctrine that a judgment may stand only when there is no 'reasonable possibility that the [practice] complained of might have contributed to the conviction.' " *United States* v. *Hasting*, No. 81-1463 (May 23, 1983), slip op. 6 (quoting *Fahy* v. *Connecticut*, 375 U.S. 85, 86-87 (1963)).

The government's failure to make transcripts of missed testimony available to absent jurors in this case did not result in an improperly returned indictment: each count was voted on by at least 12 fully informed grand jurors. Accordingly, the complained-of defect is, if error at all, harmless under any standard, and the requested remedy is wholly unnecessary and inappropriate.

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general scheme and the particular activities charged in the separate counts that followed his pattern of activity.

Finally, the Third Circuit's suggestion that transcripts be made available is not grounded in the Constitution, nor does it involve "an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials." *United States* v. *Johnson*, 457 U.S. 537, 544 (1982) (quoting *Williams* v. *United States*, 401 U.S. 646, 653 (1971)). Rather, the court of appeals merely proposed a new rule of grand jury procedure, in a "clear break with the past" (*United States* v. *Johnson*, 457 U.S. at 549 (quoting *Desist* v. *United States*, 394 U.S. 244, 248 (1969)). Such new rules are not to be applied retroactively.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

DECEMBER 1983

DOJ-1983-12